No. 13939

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM JOY BATELAAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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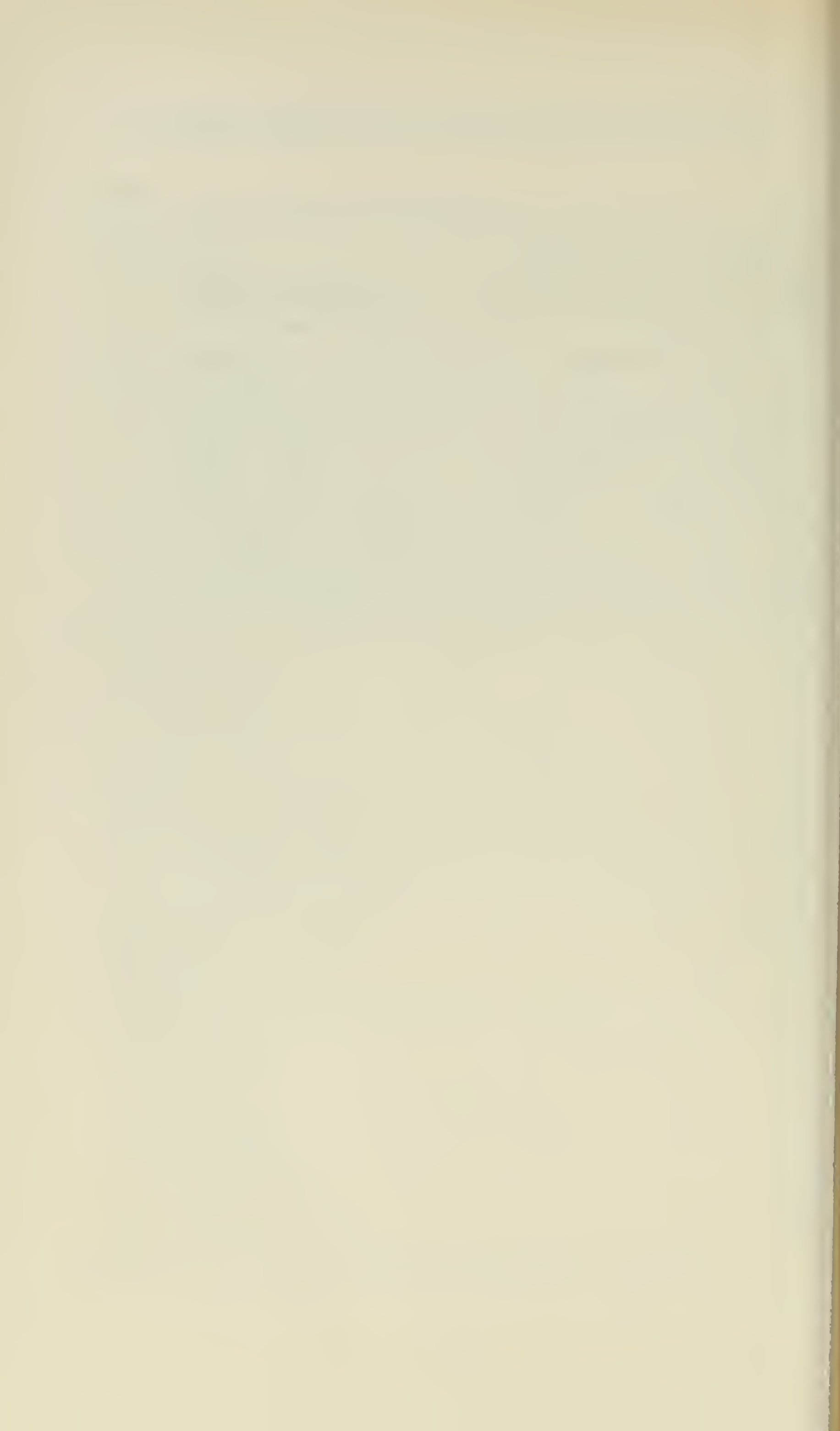

No. 13939

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FOR THE NINTH CIRCUIT.

WILLIAM JOY BATELAAN,

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vs.

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BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [3-4][1] The district court made no specific findings of fact. These

[1] Numbers appearing in *brackets* herein refer to pages of the printed Transcript of Record filed herein.

were waived. No reasons were stated by the court in writing for the judgment rendered. The judge declared orally that the motion for judgment of acquittal was denied. He convicted the appellant; he made no discussion of the principles of law involved in the case. [27-28, 29]

The trial court found appellant guilty. Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [4] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about October 13, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty. At the trial he waived the right of trial by jury. Also the findings of fact and conclusions of law by the trial judge were waived. [8] Appellant subpoenaed the production of the secret FBI investigative report, made pursuant to Section 6(j) of the act. The Government produced the FBI report at the trial. [21] The defendant offered it into evidence. [21] The authenticity and use of the FBI report were stipulated. [21-22] It was then offered into evidence. [23] The trial court made an inspection *in camera* of the FBI report. He then excluded it from evidence. [23] The report was ordered sealed as an exhibit. [24] At the close of the evidence appellant renewed his motion for judgment of acquittal. [9-13, 26] The motion for judgment of acquittal was denied. [27]

The trial court found no violation of the procedural rights of the appellant by the draft board and declared there was basis in fact for the classification. [27] Notice of appeal was timely filed. [6-7] The transcript of the record, including statement of points relied upon, has been timely filed in this Court.

THE FACTS

Appellant was born on April 15, 1932. (1)[2] Batelaan registered with his local board on July 11, 1950. (2) On April 16, 1951, he was mailed a classification questionnaire. (3)

The appellant filled out the classification questionnaire properly. He returned it and filed it with the local board on April 30, 1951. (5) In the questionnaire he showed his name and address. (6) He did not answer that he was a minister of religion. (7) He stated that he worked for the Lockheed Aircraft Corporation in Los Angeles as an assembler, working on the structure of aircraft. (8) He showed that he earned $1.15 per hour and that he worked 40 hours per week. (9)

He showed that he attended 6 years of elementary school, 3 years in junior high school and 2½ years in high school. (10) He showed that he was born in Cleveland, Ohio. (10) He signed the conscientious objector blank, Series XIV of the classification questionnaire. (11)

The local board, on May 2, 1951, mailed to him the conscientious objector form. (12) He filled out the form and filed it with the local board on May 8, 1951.

He signed Series I (B). (15) He showed that he believed in the Supreme Being. He described the nature of his belief. He showed that his belief in the Supreme Being involved duties superior to those arising from any human relation.

[2] Numbers appearing in *parentheses* herein refer to pages of the draft board file which are written in longhand at the bottom of each page and circled.

(15) He showed that as a Christian he could never take sides in the wars between the nations. He emphasized that his citizenship was in heaven and that by reason thereof he owed his obligations to Almighty God, Jehovah. (17) He showed that he was for the kingdom of Almighty God and that all worldly governments were against it. He emphasized that the whole world, in his opinion, laid under the influence of the evil one, Satan the Devil. (17)

He then emphasized that his religious belief forbade indulgence in war between nations. He relied upon scripture. He stated that he believed what the apostle Paul said, that his weapons of Christian "warfare are not carnal." (17)

He explained that he became interested in studying the Bible in the year 1946. He showed that his parents belonged to the Dutch Reformed Church. He said that he noticed that his parents were unable to give any explanation or show any understanding concerning the Bible. He showed that he began Bible study for himself and thereafter received Bible helps from Jehovah's Witnesses and the Watchtower Bible and Tract Society. He showed that, through Bible study in his home each week and attending two Bible study classes held at the church, he became familiar with the beliefs of Jehovah's Witnesses. (16, 17)

He named Mr. Piesel of San Fernando as the one upon whom he relied most for religious guidance. (16) He showed that he was not a pacifist. He emphasized that he believed in the use of force for self-defense and against those who fight against his Christian brothers. (17) He cited a number of ancient Biblical examples of using force. He underscored that Jehovah's Witnesses have the right to defend themselves against assault. He said that in doing this they had God's approval. (18)

Batelaan showed that he had consistently been preaching what he believed since December 15, 1946. He quoted Isaiah 61: 1-3. He said that if he failed to carry out the commandments of God it would mean everlasting death to him. He relied upon this course of action as consistently describing

his behavior that showed the depth of his religious convictions. (18) He said that he had given public expression to his views by preaching the gospel. (16, 18)

Batelaan listed the schools that he had attended and the jobs that he had had. (16) He then listed his residences. (19) He gave the names of his parents. (19) While he did not show that his parents belonged to any religion in the conscientious objector form, he had previously stated in a separate statement that they belonged to the Dutch Reformed Church. (17)

He showed that he had been a member of the Watchtower Bible and Tract Society since 1946. He identified his local church and showed that Piesel was the presiding minister of the congregation. He showed that the Watchtower Bible and Tract Society did not state or force people to say whether they should or should not go to war, but left it to each individual to do his own choosing based on his belief in the Bible. (19)

He showed he was a member of a labor organization. (19) He listed references. (20) He then signed the conscientious objector form at the proper place. (20)

A I-A classification was given to Batelaan on September 4, 1951, by the local board. It found that he was liable for full military service. He was denied his conscientious objector claim. (12) On receipt of notice he wrote a letter to the local board requesting an appeal. This was filed on September 12. (12, 21) He also requested a personal appearance on September 14, 1951. (12, 22) The local board set the personal appearance for September 18, 1951. (12, 23) He appeared at the time fixed for the hearing. (12)

At the personal appearance appellant showed that he was one of Jehovah's Witnesses. He emphasized that he was attending the Theocratic Ministry School at the local church one night each week. He said that he was studying for the ministry. He testified that he forgot to put in the questionnaire that he started in February of 1951. He told the board that he joined the church in 1945. He said that

his father was still a church member, presumably of the Dutch Reformed Church, and that his mother was dead. (24)

The local board asked him about his employment at the Lockheed Aircraft works. He stated that working there was consistent with his conscience. He said any job that he would get "these days," such as farming and other jobs, "would be working towards the war"; therefore since he "must work to eat, and the job at Lockheed is only to get money to live on," the job did not interfere with his conscience. (24)

The local board after the personal appearance continued him in I-A. He was mailed notice of his reclassification. (12, 24) The file was sent to the board of appeal. The board of appeal forwarded the file to the Department of Justice for an inquiry and hearing on his conscientious objector claim. (12)

The Department of Justice conducted a secret FBI investigation. A report was made by the FBI to the Department of Justice. The Department of Justice in turn forwarded the FBI report to the hearing officer. The hearing officer had the FBI report before him and used it. He referred to it in the preparation of his recommendations that were adopted by the Department of Justice and forwarded to the appeal board. [21-22]

A hearing was conducted on July 1, 1952. Appellant appeared before the hearing officer. (32) The hearing officer made a report to the Department of Justice on July 7, 1952. (32-33) The hearing officer's report was brief. It referred to his background and education. The hearing officer emphasized his employment as a riveter working on war planes at Lockheed. He found that he was a member of Jehovah's Witnesses.

A number of different items were listed by the hearing officer as basis for the denial of the conscientious objector claim. One was that he found in the FBI report appellant did not put forth an adequate effort in the ministry school of Jehovah's Witnesses. Another was that he was not one of Jehovah's Witnesses while living in Cleveland, before

moving to California, because he was not baptized until two months after he got to California. The hearing officer, however, found that Batelaan had been active since 1946 in Jehovah's Witnesses. He relied upon the fact that Batelaan had at one time in his youth been a boy scout, while living in Cleveland. He found that Batelaan was induced to become one of Jehovah's Witnesses by his brother-in-law who helped him prepare his draft papers. (33) He emphasized the fact that Batelaan was not a pacifist. (34)

The conclusion of the hearing officer was to deny the full conscientious objector status and grant to Batelaan only partial conscientious objector status. He found that Batelaan should be classified as a conscientious objector, willing to do noncombatant military service in the armed forces. The reason for this, according to the hearing officer, was because appellant was willing to use force in self-defense and in defense of others and that he was employed in war work at Lockheed. He said it was the result of Batelaan's own philosophy. He relied also on the fact that Batelaan was not born in the religion of Jehovah's Witnesses. Because of all these things he found appellant not to be sincere. (34) He recommended the I-A-O classification. (34)

Along with his report the hearing officer sent some certificates and affidavits submitted by the appellant to him at the hearing. These were signed by Harold P. Digre, Lloyd K. Stewart, Frank J. Picel and William Zumwalt. These persons all certified to the sincerity of Batelaan and his *bona fide* membership and activity as one of Jehovah's Witnesses. (27-28)

The Assistant Attorney General made a recommendation to the appeal board on July 24, 1952. He did not agree with the hearing officer. He insisted that Batelaan was not entitled even to a partial conscientious objector's classification. He contended that appellant should be denied all benefits of the law relating to conscientious objectors. The Attorney General relied upon the answer of appellant to

question number 5, in Series II of the special form for conscientious objector. (16, 17-18, 30)

The hearing officer said that the answer to this question showed that appellant was "not a pacifist" and because of this was not "opposed to participation in all forms of war." He recommended the denial of the claim for exemption as a conscientious objector. (30)

On July 29, 1952, the board of appeal classified appellant in Class I-A. The file was returned to the local board and he was notified of the classification. (12) He was given a physical examination and found acceptable. (12, 37) On October 1, 1952, appellant was ordered to report for induction October 13, 1952. (12, 38) He filed an affidavit of the pregnancy of his wife too late to gain a stay of induction. (12, 39-40) On October 14, 1952, he reported as ordered and refused to submit to induction. (12, 41, 42, 45)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. He showed that his beliefs were not the results of political, philosophical, or sociological views, but that they were based solely upon the Word of God. (15-20)

The local board and the board of appeal denied the conscientious objector status. (12) The hearing officer made a report to the Department of Justice. (32-33) He recommended the I-A-O classification. (34) The Assistant Attorney General did not concur in this recommendation. He, for the Department of Justice, in turn recommended to the appeal board that Batelaan be denied all claims for classification as a conscientious objector. The basis for this recom-

mendation was that Batelaan was not a pacifist and therefore was not entitled to the full conscientious objector status.

The Attorney General, without any evidence whatever to support it, reached the false conclusion that Batelaan was willing to participate in some forms of war or at least he found that appellant was not opposed to participation in all forms of war. How this conclusion was reached is not apparent. He recommended against the granting of either conscientious objector classification. He suggested to the appeal board that appellant be classified in Class I-A. (30)

The appeal board followed the recommendation of the Assistant Attorney General and placed Batelaan in Class I-A. (35)

On the trial of this case a complaint was made of the classification given appellant by the appeal board and against the arbitrary, illegal and invalid recommendation by the Assistant Attorney General. [12-13, 26] The motion for judgment of acquittal was denied. [27]

The question here presented, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (12, 32) A complete investigation was made by the FBI before the case was referred to the Department of Justice for a hearing. [21-22] At the hearing the hearing officer had the secret FBI report before him and used it in making his recommendation to the Department of Justice without telling appellant about it. [21-22] Batelaan did not request the hearing officer to give to him the adverse or unfavorable evidence appearing in the FBI report. [23]

At the trial an appropriate demand was made for the production of the secret FBI investigative report. [21] It was produced and marked as defendant's Exhibit A for identification. [21] A stipulation was made as to the authenticity and use of the FBI report in the chain of administrative proceedings. (21-22) Appellant offered the FBI report into evidence. Objection was made to the production of the report and also the introduction of it into evidence. [21, 23] The trial court declared the FBI report to be irrelevant and immaterial to any issue and excluded it from evidence after an *in camera* inspection of it. (23) The FBI report is a sealed exhibit in this Court. (24)

The question here presented, therefore, is whether the appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the report of the hearing officer to the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board was illegal, arbitrary, capricious and contrary to the facts appearing in the FBI report that Batelaan was a *bona fide* conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and in entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing appellant the right to use the secret investigative report at

the trial as evidence to determine whether or not the report of the hearing officer and the recommendation of the Attorney General to the board of appeal was illegal, arbitrary, capricious and contrary to the facts appearing in the FBI report that appellant was a conscientious objector.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state.

The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for identification, and the court alone inspected it. It excluded the exhibit and permitted the report to come before

this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Government waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service, which were based on "his relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The decision in *United States* v. *Alvies,* 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.—See also *Dickinson* v. *United States,* No. 57, October Term 1953, Supreme Court of the United States, 346 U. S. —, decided November 30, 1953.

In situations similar to this the courts have uniformly held that the denial of the conscientious objector status is without basis in fact. (See *United States* v. *Konides,* No. 6216, District of New Hampshire, decided March 13, 1952, and *United States* v. *Konides,* No. 6264, District of New Hampshire, decided by Judge Woodbury, Circuit Judge, S. D., on June 23, 1953.) Copies of the opinions in these two cases accompany this brief. The *Konides* case was appealed to the National Selective Service Appeal Board twice. The board gave the I-A classification twice. After each classification there were orders to report for induction issued. Konides refused to be inducted twice, and each time an indictment was issued. Each time the indictments were dismissed because of the arbitrary denial of the conscientious objector status by the National Appeal Board.—See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir., October 23, 1953.); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military service to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5: 20) These are, therefore, conscientious objections to the performance of military service, which are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service and any other service as a part of the war efforts of the nations of the Devil's world. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5: 15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God, which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the

Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

As such soldiers Jehovah's Witnesses fight lawfully with

all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16) They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10:3-5, *New World Translation; Weymouth.*

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "sword of the spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thorough-

ly, to stand firm."—Ephesians 6:10-13, *New World Translation.*

Since they are in Jehovah's army of gospel-preachers they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in Jehovah's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit Jehovah's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenant-breakers. "Covenantbreakers . . . are worthy of death." (Romans 1:31, 32) The nations of this world cannot excuse Jehovah's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from Jehovah's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

In the Hebrew Scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces

of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his people fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary, we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like

children's toys in comparison. (Joel 3: 9-15; Isaiah 40: 15) Jehovah's weapons of destruction at Armageddon will be used only by his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God," as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3: 8, *An American Translation;* Jeremiah 25: 31-33; Nahum 1: 9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18: 36, *New World Translation*)

Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render unto God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render unto Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such

law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of manpower for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim The Theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one, individually, determines for himself what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military

service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preaches the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church,* 1894, Crowell & Co., New York, p. 179 *et seq.;* E. R. Appleton, *An Outline of Religion,* 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.;* Capes, *Roman History,* 1888, Scribner's Sons, New York, p. 113 *et seq.;* Willis Mason West, *The Ancient World,* 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.;* Capes, *The Roman Empire of the Second Century,* Scribner's Sons, New York, p. 135 *et seq.;* Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe,* 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones,* 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to

teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities, with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. (N. Y.) 439, 507) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahoe* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*Freeman* v. *Scheve,* 65 Neb. 853, 879, 93 N. W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele,* 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible

scope."—*Freeman* v. *Scheve,* 65 Neb. 853, 878, 93 N. W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of the land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township,* 2 Ohio 108; *State* v. *Trustees,* Wright 506 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People* v. *Pillow,* 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher,* 49 Mass. 153; *Cass* v. *Wilhite,* 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington,* 1 Watts (Pa.) 219, 225, 26 Am. Dec. 61; *Andrew* v. *New York Bible and Prayer Book Society,* 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. —*Waite* v. *Merrill,* 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the docu-

mentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir.).

There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States* v. *Konides,* March 13, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips* v. *Downer,* 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme,* 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky., Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States,* 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32; *Vajtauer* v. *Commissioner,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.*" The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain,* 144 F. 2d 944 (2d Cir.).—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction.—327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objec-

tor to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever

since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quak-

ers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States*, 328 U. S. 61. Read 328 U. S., at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

In his recommendation the Assistant Attorney General said that because Batelaan is willing to defend himself, his family and others of Jehovah's Witnesses he is not a conscientious objector. This is an artificial and unauthorized ground for the denial of the conscientious objector status invented by both the local board upon the personal appearance and by the hearing officer in his first report. They attempted to amend the act and regulations and read into them things which are not there. The law cannot thus be watered down by writing into it provisions that do not appear in it. This type of amendment of the law is contrary to the concept of government. Neither the administrators nor the court can add to or take away from the words of Congress expressed in the act. Even the President in the promulgation of the regulations did not incorporate these specious arguments and grounds into the definition of a conscientious objector. If the draft boards, the hearing officers and others are to write the qualifications of a conscientious objector according to their whims and discretion, then the rights of the registrant will be made valueless and insecure. The law will be done away with.

Again it must be iterated that it is not necessary for a conscientious objector to be a sissy or willing to commit suicide in order to come under the definition of a conscientious objector. A man can even be classified as a conscientious objector in Class I-A-O and allowed to perform military service without bearing a gun, providing he

is willing to do hospital work or similar noncombatant service. Remember such a man is still a conscientious objector! The argument of the United States Attorney and the draft board, if followed to its logical conclusion, would authorize the forfeiture of the I-A-O classification to a conscientious objector. Congress did not intend this. If a man can be a conscientious objector and work in a hospital in an army, then why the difference here? Certainly a man can defend himself and at the same time claim conscientious objection to both combatant and noncombatant military service.

The only conceivable basis for the denial of the full conscientious objector status is that the defendant stated that he was willing to defend himself. Certainly the exercise of the right of self-defense does not carry with it the agreement that the person willing to defend himself has no conscientious objections to going into the armed forces.

Congress did not intend to forfeit the conscientious objector status to those that are willing to defend themselves. This is proved by the provision for the I-A-O classification. This classification is for the conscientious objector who is willing to do noncombatant service in the armed forces. If willingness to do this type of service does not forfeit the conscientious objector status, then by force of the same reason willingness of the conscientious objector to defend himself with his own hands when attacked does not impeach his good faith. The pivotal factor in determining the conscientious objector status is whether the registrant objects to military service on account of religious training and belief and not whether he objects to self-defense. If the facts show that he has conscientious objections to both combatant and noncombatant military service then he is entitled to the conscientious objector status regardless of his lack of objections to self-defense. Willingness to defend oneself is immaterial and irrelevant to the issues involved in the case.

If Congress intended to forfeit a man's rights as a conscientious objector because he would defend himself in

case of assault upon his person, then certainly Congress would have made this an element of the conscientious objector status. Congress explicitly stated that objections to military service could not be based on political and philosophical bases. Congress could very well have stated that a man could not be a conscientious objector if he was willing to fight in self-defense. From the dawn of history of mankind it has been the prerogative of an individual to defend himself. Self-defense has been said to be the first law of nature. It is the law of God. Self-defense is inherent in the nature of man. Congress knew this characteristic of man when it passed the law. Had Congress intended to eliminate a person who was willing to defend his own life from the status of conscientious objector, it would have plainly said so.

The law grants the conscientious objector status to one who has objections to participation in both combatant and noncombatant military service in the armed forces because his belief arises out of obligations to the Supreme Being that are superior to those owed to the state. Congress did not say that the status was granted only to people who were extreme pacifists. Taking Congress at its own words, it cannot be contended by anyone, whether he be a draft board member, judge or prosecutor, that it is necessary to willingly submit to destruction of one's own life in order to be a conscientious objector to military service. Such interpretation contended for is unreasonable. It pulls the teeth out of the provisions protecting conscientious objectors. Unless and until Congress explicitly states that one who is willing to defend himself is not a conscientious objector, then it is beyond the prerogative of the Government or the courts to read into the law something that Congress did not say.

A man can be a conscientious objector under the act and still be willing to fight in defense of his life, his loved ones and his home. A man can be a very sincere conscientious objector to service in the armed forces, combatant

or noncombatant, and still be willing to fight to defend his own life. It is virtually impossible for a man to be a conscientious objector if the law is given the interpretation that has been contended for in this case. Almost every person, even if a coward, a sissy or extreme pacifist, when put to the test will, as a last resort, fight to defend himself. Since it is the 'first law of nature,' which almost every man will exercise when placed in the position where it is necessary, it is unreasonable to suggest that Congress intended to defeat, by this sophisticated type of reasoning, the very purpose of the exemption.

Congress had in mind exempting people who had conscientious objections to service in the armed forces. Congress did not say that the exemption extended only to people who had objections to participation in service in the armed forces and also objections to the use of force in self-defense. Since the willingness to fight in self-defense was not incorporated into the act and regulations as a basis for the denial of the conscientious objector status, it is absolutely unreasonable to hold that a man cannot be a conscientious objector unless he also objects to the use of force under every circumstance, including self-defense.

A Christian who is one of Jehovah's Witnesses, as is defendant, is authorized by the law of God to defend his own life. In order to protect himself and his life he may use force to such extent as appears reasonably necessary. If required to repel and quell a bodily attack upon himself and his brothers, he may use force to the extent of killing. This is authorized by the law of the land. A Christian need not always retreat before defending against an aggressor. Sometimes retreat under the circumstances would be more dangerous than to stand one's ground and fight. This was

the position taken by defendant and explained to his local board and the hearing officer.

The argument that follows is based upon the answers given by the defendant in his draft file. This documentary evidence appearing in the draft board file supports in every respect the argument that follows.

It is entirely consistent for a minister to be a conscientious objector to military service and yet not be a pacifist. Pacifism means refusal to fight or kill under any circumstances. A Christian will fight and even kill under some circumstances, which are limited. Jehovah's Witnesses are not pacifist, because they will fight when God authorizes them to fight. They will fight in defense of their ministry and their brothers. (Matthew 12:49, 50) They have precedent for fighting for Jehovah's work and their brothers. Abraham fought in order to protect and rescue Lot. (Genesis 14) Nehemiah and his brothers fought to defend Jehovah's work in rebuilding the walls of Jerusalem. —Nehemiah 4.

The courts have uniformly held that willingness to exercise self-defense or defend others from violence is not basis for denial of the conscientious objector status.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir., June 26, 1953); *United States* v. *Pekarski,* — F. 2d — (2d Cir. October 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir., December 7, 1953).

It is, therefore, respectfully submitted that the motion for judgment of acquittal should have been sustained, because the board of appeal arbitrarily and capriciously classified Batelaan in I-A and denied him his claim for classification as a conscientious objector without basis in fact.

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The secret report of the FBI made in the investigation of the conscientious objector claim of appellant was subpoenaed. Upon the trial it was offered in evidence by the appellant. The trial court excluded the document and forbade it to be received into evidence. It ordered it sealed and marked for identification so that the bill of exception on the ruling denying admission of the document into evidence could be preserved for this Court. The appellant moved to inspect the document and requested the court to receive it as evidence on several occasions. This request was denied every time that it was made. The trial court found the document to be material, but refused to allow it to go into evidence because it held the order of the Attorney General, No. 3229, made the report confidential and forbade that it be received into evidence.

Under the decision of the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete résumé or summary of all the FBI investigative report and give it to appellant. A résumé or summary was given to appellant on the hearing. A résumé or summary was made by the hearing officer to the Department of Justice.

The trial court, as a result of *Nugent* v. *United States,*

The only way that the Court can determine whether the summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the report produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States* v. *Nugent,* 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States* v. *Nugent,* 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *United States* v. *Nugent,* 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by the Attorney General's Order

No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy,* 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

> " . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . "

Mr. Justice Jackson in his dissent wrote:

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and

> the corrupt to play the role of informer undetected and uncorrected. Cf. In re *Oliver,* 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S., at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the defendant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, and "fair play." However,

Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, at 469:

> " . . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske* v. *Comingore,* 177 U. S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472:

> "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valu-

able evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139:

> ". . . but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces . . ."

United States ex rel. *Touhy* v. *Ragen,* 340 U. S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle that distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company* v. *Nashville Coal Company,* 55 F. Supp. 65 (W. D. Ky.) as follows:

> "I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession."

It has been repeatedly held that Order No. 3229 and 5 U. S. C. § 22 do not establish an inexorable privilege and command prohibiting disclosure of the FBI report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held

that the privilege was waived and the Government could not successfully refuse to produce the report when demanded. It seems that when it became material in these administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the FBI report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

> "A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' *Hurd* v. *People,* 25 Mich. 405."—*United States* ex rel. *Montgomery* v. *Ragen,* 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.). There the court said:

> "However, none of these cases involved the

> prosecution of a crime consisting of the very matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.)) In that case the court said:

> "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. *Beckman,* 155 F. 2d 580 (2d Cir.), in-

volved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said:

> "We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

In *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 3229, relied on by the Government in support of its position that it may not be required to produce the documents requested, gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be "not inconsistent with law."

The regulation, as construed and applied by the Attorney General in this case, is invalid and "inconsistent with law" expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17(c), as interpreted in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley* v. *United States,* 81 F. Supp. 518, 527 (E. D. S. C. 1948)) A departmental regulation against disclosure must yield to an Admiralty Rule. (*O'Neill* v. *United States,* 79 F. Supp.

827, 830 (E. D. Pa. 1948)) Order No. 3229 must also yield to Section 13(b) of the Universal Military Training and Service Act and Section 3(c) of the Administrative Procedure Act.

In *United States* v. *Schine Chain Theatres,* 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not."

In *Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.), Judge Augustus Hand said:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual."—163 F. 2d 133, at 138.

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. He said:

> "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., at p. 172.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman* v. *Poindexter,* 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court."

This point is further supported by the holding in *Griffin* v. *United States,* 183 F. 2d 990 (D. C. Cir.), where the court said:

> "However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger* v. *United States,* 205 U. S. 78, 88.' "—183 F. 2d, at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3229, among other things, wrote:

> "If questioned the officer or employee should state

> that the material is at hand and can be submitted to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed."

Recently, however, the Attorney General has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, said:

> " . . . and if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made."—244 U. S., at 103.

The same rule ought to apply in the determination of the privilege urged by the Government.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to grant the motion for judgment of acquittal. The appellant, in the alternative, requests the Court to remand the case for new trial because of the error of the trial court in excluding relevant and material evidence, the secret FBI investigative report.

Respectfully,

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